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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD P. McCLURE,

Petitioner,

v.

WILLIAM F. GALVIN,
SECRETARY OF THE COMMONWEALTH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court For The Commonwealth Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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Pro Se

October 3, 2002

QUESTIONS PRESENTED

1. Whether the alleged vote dilution suffered by the petitioners, via the fragmentation of the town of Chelmsford under Ch. 125 of the Acts of 2001, constitutes a violation of equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution and Art. 101 of the Massachusetts Constitution.

2. Whether the "nearly as may be" language of Art. 101 to the Massachusetts Constitution sufficiently complies with the federal "ten percent rule" so as not to impose stricter standard for population equality at the expense of the same "nearly as may be" standard established under said Art. 101 for respecting territorial integrity of political subdivisions.

3. Whether the respondent's post hoc justification for the fragmentation of the town of Chelmsford; the desire to reach a closer degree of population equality within just four abutting districts, *in isolation*, within a statewide redistricting plan containing 160 districts, was:

   (a) a rational purpose within its discretion supported by valid evidence, and

   (b) whether the *method of measurement* of the alleged improvement in population equality was consistent with well established state and federal case law surrounding legislative redistricting.

4. Whether, in light of the totality of the circumstances surrounding this case, the Legislature's fragmentation of the town of Chelmsford under Ch. 125 of the Acts of 2001 constitutes partisan gerrymandering violative of the Fourteenth Amendment to the United States Constitution and Art. 101 of the Massachusetts Constitution.

PARTIES TO THE PROCEEDING

The named petitioner in this case is Richard P. McClure, a resident and registered voter of the town of Chelmsford, Middlesex County, Massachusetts. The respondent is William F. Galvin, Secretary of the Commonwealth of Massachusetts.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Richard P. McClure, respectfully petitions that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on April 29, 2002 in the matter of Richard P. McClure, John P. Clancy, John S. Fudge, Jr. and Peter Dulchinos v. William F. Galvin, Secretary of the Commonwealth. Said judgment finally denied petitioners' complaint and petition for a writ of mandamus originally filed in said Supreme Judicial Court pursuant to Section 3 of Amendment Article 101 of the Massachusetts Constitution and Section 2 of Chapter 125 of the Acts of 2001.

OPINIONS BELOW

The Supreme Judicial Court for the Commonwealth of Massachusetts has issued an opinion in this case, a copy of which appears in Appendix A to this petition and is reported as *McClure et al. v. Secretary of the Commonwealth,* 436 Mass. 614 (2002). Petitioner has also filed applications to the individual justices D. Souter and J. Stevens seeking to stay the judgment of the Massachusetts SJC in *McClure, id.,* and for further injunctive relief pending appeal. Both applications were denied without comment and reference to same in this petition is made by footnote.

JURISDICTION

The opinion and judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was

entered on April 29, 2002. The jurisdiction of this Court is invoked under 28 USCA Sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **U.S. Constitution**
   Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. **Massachusetts Constitution**
   Amend. Art. 101 (as amended through amend. art. 119)

SECTION I.

The House of Representatives shall consist of one hundred and sixty members. The General Court shall, at its first regular session after the year in which said census was taken, divide the Commonwealth into one hundred and sixty representative districts of contiguous territory so that each representative will represent an equal number of inhabitants, as nearly as may be; and such districts shall be formed, as nearly as may be, without uniting two counties or parts of two or more counties, two towns or parts of two or more towns, two cities or parts of two or

more cities, or a city and a town, or parts of cities and towns, into one district. Such districts shall also be so formed that no town containing less than twenty-five hundred inhabitants according to said census shall be divided.

STATEMENT OF THE CASE

Preliminarily, petitioner respectfully requests the Court to note that time is of the essence in this case. The Massachusetts legislative election is scheduled for November 5, 2002. Candidates are currently campaigning in their respective districts as established under Ch. 125 of the Acts of 2001. Should the Court be inclined to act on petitioners' Petition for Writ of Certiorari, petitioners are ready to meet any schedule for briefing and oral argument that the Court may wish to set. This petition may, if certiorari is granted and the Court wishes, be treated as petitioners' brief on its merits. Counsel for the respondent has received copies of this petition and a Certificate of Service is enclosed herewith.

1. Background. This redistricting suit was an original action filed with the Supreme Judicial Court for the Commonwealth of Massachusetts pursuant to Section 3 of Amendment Article 101 of the Massachusetts Constitution and Section 2 of Chapter 125 of the Acts of 2001. Said action contested the Legislature's division of the town of Chelmsford into sub-parts of four separate districts where it had previously constituted its own district in combination with the much smaller town of Carlisle and, based on the new census data, could have continued to do so.

Plaintiffs' complaint alleges that the quartering of the town of Chelmsford under Ch. 125 of the Acts of 2001 (the redistricting statute) denies the plaintiffs and those "similarly situated" not only the right to equal protection of the laws guaranteed under the Fourteenth Amendment to the United States Constitution but that the Act is also violative of Art. 101 of the Massachusetts Constitution which requires that territorial integrity be protected "as nearly as may be." (See Ch. 125 Redistricting Map at App. E) Plaintiffs claim that their votes have been unconstitutionally diluted as a result of the excessive fragmentation of the town of Chelmsford and that the true reason for the town's fragmentation was unconstitutional partisan gerrymandering. (See Petitioner's complaint at App. D)

2. The Supreme Judicial Court's Decision. In a 4-3 decision, the sharply divided Court concluded "that the plaintiffs have failed to demonstrate that the redistricting statute violates either the Massachusetts or the United States Constitution. Accordingly, the defendant is entitled to judgment." *McClure, id.* at 2.

The majority opinion acknowledges adoption of the two-step inquiry established under *Town of Brookline v. Secretary of the Commonwealth,* 417 Mass. 406 (1994) for the purposes of determining "whether a redistricting plan meets the territorial requirements of art. 101." This process requires the plaintiff to first demonstrate that an alternative plan could have been devised which would have resulted in less divisions of the municipality in question without a "ripple effect" on other defined districts.

Both the lower Court and the respondent assumed, without deciding, that the plaintiffs have met that burden

by "proffering a satisfactory alternative plan . . . Under that plan, Chelmsford would be divided between only two districts; the population of the reconfigured Second, Fourteenth, Sixteenth, and Seventeenth Middlesex districts proposed by the plaintiffs would each be well within the Federal population equality +/- 5% standard and there would be no identifiable adverse impact on other municipalities." *McClure, id.* at 13.[1] (See Proposed Alternative Plan at App. D)

The Court next turns to the second prong of the test; justification. Respondent had, in the lower court, argued that the Legislature's justification for the division of Chelmsford was to obtain a closer degree of population equality within those four contested districts alone. The lower Court accepted this justification stating that "the plaintiffs' plan creates higher maximum and average deviations in population equality *for the four districts in question* (emphasis added). . . . Although the plaintiffs' alternative plan meets Federal equal protection requirements, *Brown v. Thomson*, 462 U.S. 835 (1983) (less than 10% maximum deviation), art. 101's requirement that the Legislature achieve population equality 'as nearly as may be' leaves the Legislature with considerable discretion to seek closer approximation to population equality than is required by the Federal equal protection clause."

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[1] The Court fails to note in its decision, for unknown reasons, that the plaintiffs' alternative plan also returns one of the districts in question, in its entirety, to the city of Lowell; further enhancing the territorial integrity required under art. 101. See *McClure, id.*, dissent at 7.

The Court also notes "the Legislature's discretion is not without limit; the Massachusetts Constitution 'prohibits any departure from either [the territorial integrity or the population equality requirement] *that is unreasonable in the light of all the limitations imposed upon legislative action* (emphasis added)' *Merriam v. Secretary of the Commonwealth,* supra at 260, quoting *Attorney General v. Secretary of the Commonwealth,* 306 Mass. 25 (1940). The Court concludes that '**the extent to which either of these requirements shall yield to the other' is within the authority and the discretion of the legislature to determine.**" (emphasis added) *McClure, id.* at 16.

As to the political gerrymandering claim, the court, citing *Davis v. Bandemer*, 478 U.S. 109 (1986), concludes that the plaintiffs have failed to show that "the Legislature's redistricting plan has a discriminatory effect . . . Nor have the plaintiffs shown discriminatory intent on the part of the Legislature." *McClure, id.* at 18. "To succeed on a political gerrymandering claim, a plaintiff must show that the Legislature has made a purposeful, concerted effort to disfavor a political party through the redistricting process." *McClure, id.* at 19.

REASONS FOR GRANTING THE WRIT

A. The Differing State and Appellate Court Interpretations As To The *Per Se* and *Prima Facie* Constitutionality Of a State Redistricting Plan Warrants This Court's Review.

Given the fact that state legislative redistricting cases across the country have a high propensity for litigation, the varying state and appellate court interpretations of

whether a state's plan who's average deviations fall below the federal +/- five percent rule are *per se* or *prima facie* constitutional so as to survive an equal protection claim warrants clarification by this Court. Compare the Supreme Court of Idaho's holding in *Bingham County v. Idaho Commission for Reapportionment,* 2002 WL 318329 (Idaho) to the Supreme Judicial Court of Massachusetts' holding in the present case, *McClure et al.*[2]

Article III, Sec. 5 of the Idaho Constitution, similar to art. 101 of the Massachusetts Constitution (as interpreted in *Brookline*), was interpreted by that state's Supreme Court as

> "A county may not be divided and parsed out to areas outside the county to achieve ideal district size, if that goal is attainable without extending the district outside the county." Article III, Sec. 5 of the Idaho Constitution prohibits the division of counties, except to meet the constitutional standards of equal protection."

Bingham, id. at *4.

This holding is consistent with petitioner's argument advanced previously. Where federal and state case law have held that a state legislative redistricting plan with a +/- 5% maximum population deviation from the "ideal

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[2] See also concurring state supreme court decisions in *In re: Reapportionment of the Colorado General Assembly*, 45 P.3d 1237 (Jan. 2002) and *Stephenson et al. v. Bartlett et al.*, 562 S.E.2d 377 (April 2002) as well as J. Rehnquist's May 2002 decision in *Bartlett v. Stephenson*, 122 S.Ct. 1751 as set forth in petitioner's Application to Stay Judgment at 4-6.

district population" satisfies the equal protection principles of the Fourteenth Amendment to the United States Constitution, it is both irrational and illogical, as well as unconstitutional, that a Legislature would continue to divide cities (or counties) beyond that point in violation of the state constitutional mandate prohibiting it. The majority of the Supreme Judicial Court of Massachusetts, when faced with the identical issue, chose to make the Legislature's choice "discretionary."

It is also somewhat ironic to note that the deviations from ideal population equality in *Bingham, id.,* were above the +/- 5 percent rule so as to allow for the legislative discretion allowed under *Mahan v. Howell*, 410 U.S. 315 (1973), yet the Idaho Supreme Court, in *Bingham* held that even before discretionary choices can come into play,

> " . . . they are subordinate to the threshold standard of Article III, Sec. 5 that counties may not be divided unnecessarily. That is the baseline for consideration within the state system – trumped only by the Constitutional need for equal protection." *Id.* at *6.

In the case at bar, all of the 160 Massachusetts state legislative districts, as well as the petitioner's four proposed alternative districts, were within the +/- 5% maximum deviation from ideal population equality required to sustain a prima facie defense against claims of unconstitutional vote dilution; however, the Supreme Judicial Court for the Commonwealth of Massachusetts held (arguably incorrectly) that legislative discretion *trumps* Art. 101:

> " . . . Art. 101's requirement that the Legislature achieve population equality "as nearly as may be" leaves the Legislature with considerable

> discretion to seek closer approximation to population equality than is required by the Federal equal protection clause."

McClure, id. at 13-14.

B. The Respondent's *"Post Hoc Justification"* For The Fragmentation Of The Town Of Chelmsford Fails To Meet Both The Federally Accepted "Rational Basis" Test Or The "Reasonable Justification" Test Specifically Required Under Controlling Massachusetts Case Law

It is on these two points; the respondent's "post hoc justification" for choosing to divide the town of Chelmsford more than was constitutionally necessary and the "discriminatory intent and effect" which were the true motivating factors for the division of Chelmsford by the Legislature that warrant this Court's reversal of the lower Court's decision. The facts and the evidence of this case, as applied to the well established state and federal case law on the subject, demand nothing less. As noted in the dissent:

> "The notion that Chelmsford's fragmentation into four districts is justified by a desire to improve the distance from ideal population size by a mere eight people per district is patently absurd . . . the eight person per district 'gain' in average population deviation engendered by the Legislature's plan is so de minimis as to be nonexistent, and reflects only mathematical coincidence, not legislative design."

McClure, id. dissent at 9.

Under the controlling Massachusetts case, *Brookline v. Secretary of the Commonwealth,* the onus is on the plaintiff to prove that a redistricting plan with less divisions of the municipality in question could have been drawn, without ripple effects on other districts and, if this could be proved " . . . the Legislature's plan violates art. 101 if its divisions of Chelmsford into more districts is "without justification." *McClure, id.*, dissent quoting *Brookline, supra* at 3.

Faced with the need for a post hoc justification of the Legislature's fragmentation of Chelmsford, the respondent's "best" argument was that the differences in average population deviation between the four contested districts, *in isolation,* was superior to the petitioner's alternative plan which reduced the number of divisions of Chelmsford from four to two and also had a average standard deviation of 2.81; well within the +/- 5% standard. *McClure, id.* at 6, dissent of J. Sosman (App. A).

The justification proffered by the respondent for the Legislature's decision to divide the town of Chelmsford into sub-parts of four different districts was alleged to be that the Legislature's plan had a smaller, therefore superior, average standard deviation from the ideal district, as applied to the four contested districts, in isolation, among a redistricting statute involving 160 districts.

> "The Court today accepts as 'justification' for this fragmenting of Chelmsford the claim that the Legislature's plan achieves a 'closer degree of population equality' . . . However, the claimed improvements in measurements of population equality are not only miniscule, but they have been misapplied to the facts of this case in a fashion contrary to their use in other redistricting cases . . . All of the cases cited by the

> defendant in the support of the use of these statistical measures apply them to the entirety of a districting scheme. See *Abrams v. Johnson*, 521 U.S. 74; *Brown v. Thomson*, 462 U.S. 835; *Karcher v. Daggett*, 462 U.S. 725; *White v. Weiser*, 412 U.S. 783; *Gaffney v. Cummings*, 412 U.S. 735."

McClure, *id.* at 3-4, dissent of J. Sosman.[3]

> "Not surprisingly, the defendant cites no authority for the proposition that these specific statistical measures are of any utility when applied to only a few districts (in isolation) within a much larger plan . . . Indeed, the population equality gains claimed are so trifling as to be mere coincidence, not the product of a legislative decision to give greater preference to such measurements of population equality at the expense of territorial integrity."

McClure, *id.* at 8, dissent of J. Sosman.

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[3] See also Petitioner's Application to Stay Judgment at 7. "Only by examining the plan 'in its totality,' may we judge whether the allocation of any seat in the House is constitutional." J. Blackmun dissenting in *Brown v. Thompson*, supra, quoting *Lucas v. Colorado General Assembly*, 377 U.S. 713, 735 (1964).

C. The Lower Court's Ruling, If Permitted To Stand, Would Effectively Foreclose Any Equal Protection Challenge To A State Legislative Redistricting Plan After Said Plan's Maximum Population Deviation Has Been Determined To Be Within +/- 5%.

The lower Court's ruling that the fragmentation of the town of Chelmsford was within said Legislature's "discretionary powers," if permitted to stand, would effectively foreclose any equal protection challenge to a state legislative redistricting plan after said plan has been determined to be below the federal +/- five percent rule, contrary to the Fourteenth Amendment to the United States Constitution, the Voting Rights Act and art. 101 of the Massachusetts Constitution and would further conflict with well established federal case law on the subject.

In *Daly v. Hunt,* 93 F.3d 1212 (1996), a North Carolina case involving a redistricting plan for the election of county commissioners and school board members, the United States Court of Appeals for the Fourth Circuit held:

> ". . . as plan had only 8.33% maximum deviation in total population, it could not be found to be in violation of 'one person, one vote' principle, *absent evidence that the plan was product of bad faith, arbitrariness, or invidious discrimination.*" (emphasis added). *Id.* at 1212.

The case was remanded to the district court to receive any additional evidence. In her dissenting opinion of the case at bar, J. Sosman took great pains to point out the

evidence of bad faith (at 11-12 n.11), arbitrariness (at 4-10) and discrimination (at n.12) which was overlooked or minimized by the majority.[4]

This Court, in *Roman v. Sincock,* 377 U.S. 710 (1964), had already established this requirement that the plaintiff be required to show the apportionment process had "a taint of arbitrariness or discrimination" to survive summary judgment when the maximum population deviation is below 10%.

> "In other words, for deviations below 10%, the state is entitled to a presumption that the apportionment plan was the result of an 'honest and good faith effort to construct districts . . . as nearly of equal population as is practicable' (quoting *Reynolds v. Sims,* at 577, *Id.*) . . . However this is a rebuttable presumption."

In light of the evidence presented below and the strongly authored dissent by the minority, it should be apparent that the decision by the majority of the Supreme Judicial Court of Massachusetts in *McClure* totally disregards the direction of this Court, as established by the decisions in *Reynolds, supra* and *Roman*, the direction of the United States Court of Appeals for the Fourth Circuit, in *Daly,* the direction of the state supreme courts of Idaho; *Bingham et al. v. Idaho Commission for Reapportionment et al.*, Colorado; *In re: Reapportionment of the Colorado General Assembly* and North Carolina; *Stephenson v. Bartlett et al., supra* even the direction of the controlling

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[4] See also Petitioner's Application for Stay at 9-12 re: evidence of bad faith.

Massachusetts case of *Town of Brookline v. Secretary of the Commonwealth, supra* and its judgment, in favor of the respondent, should be reversed.

THE QUESTIONS PRESENTED ARE NOT MOOT

As stated previously, the Massachusetts legislative election is scheduled for November 5, 2002 and there is still time for this Court to enter a Stay of Judgment and/or injunctive relief. This would not be the first redistricting case where the Court allowed injunctive relief prior to the election. Finally, even if the elections were to go forward prior to this Court's review, the effects of the unconstitutional actions of the Massachusetts legislature will continue until the next ten year census.

CONCLUSION

WHEREFORE, for the reasons set forth above, petitioner's request that a writ of certiorari issue from this Honorable Court to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts in re: Richard P. McClure, John P. Clancy, John S. Fudge, Jr. and Peter Dulchinos v. Secretary of the Commonwealth. In the event that the petition is granted, petitioner requests that the judgment of the court below be reversed, that the cause be remanded, and that the court below be directed to issue the writ of mandamus, injunctive and declaratory relief, award attorney's fees and costs, as well as any other relief this Court may deem warranted.

Dated: October 3, 2002

Respectfully submitted,

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APPENDIX A

RICHARD P. MCCLURE & others[1] *vs.* SECRETARY OF THE COMMONWEALTH.

Suffolk, March 7, 2002. – April 29, 2002.

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ.

Elections. Constitutional Law, Elections, Apportionment of representation, Equal protection of laws, Redistricting, Representative districts. *Federal Voting Rights Act.*

Civil action commenced in the Supreme Judicial Court for the Commonwealth on November 16, 2001.

After referral to the Supreme Judicial Court for the county of Suffolk, the action was returned to the Commonwealth court by *Greaney,* J., to proceed on an expedited basis.

Richard P. McClure, pro se.

Peter Sacks, Assistant Attorney General (*Lawrence S. DiCara,* Special Assistant Attorney General, with him) for Secretary of the Commonwealth.

CORDY, J. This is another dispute arising out of legislative redistricting for the 2002 general election. See *Mayor of Cambridge v. Secretary of the Commonwealth, ante* 476, 477, (2002). In addition to declaratory and injunctive relief, the plaintiffs, registered voters living in various precincts of the town of Chelmsford, seek relief in the nature of mandamus against the defendant, Secretary of the Commonwealth, that would invalidate the 2001

[1] John P. Clancy; John S. Fudge, Jr.; and Peter Dulchinos.

redistricting plan for the 160 representative districts of the House of Representatives. The plaintiffs maintain that St. 2001, c. 125, § 1 (the redistricting statute), which establishes the new districts, is unconstitutional under art. 101, as amended by arts. 109, 117, and 119 of the Amendments to the Constitution of the Commonwealth, because it places portions of Chelmsford in four representative districts when art. 101's requirements could have been satisfied by dividing it into fewer districts.[2] The plaintiffs also claim that the redistricting constitutes unconstitutional partisan gerrymandering in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.[3] We conclude that the plaintiffs have failed to demonstrate that the redistricting statute violates either the Massachusetts or the United States Constitution. Accordingly, the defendant is entitled to judgment.

1. *Procedural background.* Section 2 of the redistricting statute vests jurisdiction in the Supreme Judicial

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[2] Article 101 of the Amendments to the Constitution of the Commonwealth, as amended, states, in part, that the Legislature shall "divide the Commonwealth into one hundred and sixty representative districts of contiguous territory so that each representative will represent an equal number of inhabitants, as nearly as may be; and such districts shall be formed, as nearly as may be, without uniting two counties or parts of two or more counties, two towns or parts of two or more towns, two cities or parts of two or more cities, or a city and a town, or parts of cities and towns, into one district. Such districts shall also be so formed that no town containing less than twenty-five hundred inhabitants . . . shall be divided."

[3] The plaintiffs also claim in a single sentence that the redistricting statute violates due process. Their claim does not rise to the level of acceptable appellate argument. See *Adoption of Kimberly,* 414 Mass. 526, 536-537 (1993).

Court for "any petition for a writ of mandamus relative to the establishment of 160 representative districts under section 1 [of this act]." See also art. 101, §§ 1 and 3. Accordingly, the plaintiffs filed their complaint in this court. The case was referred to the county court to be prepared for disposition "as promptly as possible." The parties filed a statement of agreed facts. A single justice then ordered that the case proceed in this court on an expedited basis.

2. *Constitutional and statutory requirements.* Article 101, adopted in 1974, reduced the House of Representatives from 240 to 160 members, eliminated the last vestiges of territorial representation, and firmly established population equality as the main organizing principle for legislative districts.[4] As we stated in *Brookline v. Secretary of the Commonwealth,* 417 Mass. 406, 423-424, (1994), "art. 101 directs that each representative 'represent an equal number of inhabitants,' not cities and towns, thereby requiring equal representation, in the sense that persons are placed in a district that has the same number of inhabitants as every other district, 'as nearly as may be.'"

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[4] The Constitution formerly provided for cities and towns themselves to be represented in the House of Representatives. Part II, c. 1, § 3, art. 2 of the Massachusetts Constitution. Arts. 12, 13 of the Amendments to the Massachusetts Constitution. Municipal representation ended, however, in 1857, with the adoption of art. 21 of the Amendments that required that representation be apportioned to and within counties, "equally, as nearly as may be," based on the numbers of "legal voters." In 1970, art. 92 of the Amendments was ratified, requiring that every representative district in the Commonwealth comprise "an equal number of inhabitants, as nearly as may be," and ending apportionment by county except that Dukes and Nantucket counties were each made a separate district. In 1974, art. 101 eliminated those exceptions.

As subsequently amended, art. 101 also requires the Legislature to redivide the Commonwealth into new representative, senatorial, and councillor districts, in the year following each Federal census. The purpose for this mandatory decennial redivision is to ensure that districts are appropriately adjusted to meet population changes occurring in the ten-year period between each Federal census.

In dividing the Commonwealth into 160 representative districts, the Legislature must conform to State and Federal constitutional and statutory requirements, some of which are inherently contradictory. See *Mayor of Cambridge v. Secretary of the Commonwealth, supra* at 478-479. Article 101 mandates that the Legislature's division of the Commonwealth results in districts "[1] of contiguous territory [2] so that each representative will represent an equal number of inhabitants, as nearly as may be; [3] and such districts shall be formed, as nearly as may be, without uniting two counties or parts of two or more counties, two towns or parts of two or more towns, two cities or parts of two or more cities, or a city and a town, or parts of cities and towns, into one district[; and 4 such] districts shall also be formed that no town containing less than twenty-five hundred inhabitants . . . shall be divided." *Merriam v. Secretary of the Commonwealth,* 375 Mass. 246, 248 (1978). See *Brookline v. Secretary of the Commonwealth,* 417 Mass. 406, 413-414 (1994).

The equal protection provision of the Fourteenth Amendment independently imposes an equal representation requirement on electoral districting. *Reynolds v. Sims,* 377 U.S. 533, 577 (1964). The United States Supreme Court has stated that an apportionment plan with a maximum population deviation of under 10% is a

deviation that the Legislature need not justify. *Voinovich v. Quilter,* 507 U.S. 146, 161 (1993), quoting *Brown v. Thomson,* 462 U.S. 835, 842-843 (1983). See *Brookline v. Secretary of the Commonwealth, supra* at 414, and cases cited. The maximum population deviation is calculated by determining the range of population deviation between the largest and smallest districts from the "ideal population" of a district.[5] *Mayor of Cambridge v. Secretary of the Commonwealth, supra* at 478. See also *Black Political Task Force v. Connolly,* 679 F. Supp. 109, 114 (D. Mass. 1988). Thus, where a plan includes no district with a population more than 5% under or 5% over the "ideal district population," the plan is within the 10% range and thus meets Federal population equality requirements (±5% standard).[6] The Federal Voting Rights Act of 1965 must also be considered by the Legislature when implementing a redistricting plan. *Brookline v. Secretary of the Commonwealth, supra* at 414-415. See *Mayor of Cambridge v. Secretary of the Commonwealth, supra* at 479.

3. *The 2001 redistricting plan.* The 2001 redistricting statute and the legislative deliberation that led to its enactment cannot be adequately understood or evaluated without examining the progression and evolution of its predecessors. Between the adoption of art. 101 in 1974 and the enactment of the redistricting statute, the Legislature passed four successive redistricting plans. Each successive

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[5] The "ideal population" of a district is the mathematical division of the number of districts into the total population.

[6] A plan, of course, can still meet Federal population requirements even if it had a district that was 6% over the ideal population so long as no other district was more than 4%.

plan contained more districts that united parts of or whole cities, towns, or counties than the preceding plan, and each moved closer to population equality between districts, with only the last plan meeting the Federal ±5% standard.

The first plan (St. 1977, c. 277) was based on the 1975 State census.[7] It included ninety-two (out of 160) districts that did not meet the art. 101 goal of avoiding combinations of political subdivisions. Even with all of these combinations the plan included districts that deviated from the ideal population by more than ±5%. *Brookline v. Secretary of the Commonwealth, supra* at 415-416 n.10.

The second plan (St. 1987, c. 341, as amended by St. 1987, c. 715) was based on the 1985 State census. It included ninety-five districts that did not meet the art. 101 goal of avoiding combinations of political subdivisions. But, like the 1977 plan, it also included districts that deviated from the ideal population by more than ±5%. *Id.* The plan was challenged in Federal court on equal protection ("one person one vote") grounds in *Black Political Task Force v. Connolly, supra.* The population deviations between districts (including a maximum deviation of 21.9%, *id.* at 124) were unsuccessfully justified in that case by the Secretary of the Commonwealth, who relied on art. 101's instruction to minimize the creation of districts that combined political subdivisions. The court concluded that art. 101's stated policy of minimizing the division and

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[7] The use of the State census was abolished by art. 117 of the Amendments to the Massachusetts Constitution, which amended art. 101 in 1990 to require the Federal census be used as the basis for determining districts.

unification of cities and towns did not provide sufficient justification for the deviations from population equality and, accordingly, struck down the 1987 plan. *Id.* at 130-131.

In response to the decision in the *Black Political Task Force* case, the Legislature enacted a third plan (St. 1988, c. 11) that included one hundred districts that did not meet the art. 101 goal of avoiding combinations of political subdivisions. Yet the plan still contained some districts that deviated from the ideal population by the ±5% standard. *Brookline v. Secretary of the Commonwealth, supra.* Only two years later, when the 1990 Federal census was completed, ninety of the 160 districts were of questionable validity under Federal population equality standards. *Id.* at 411.

The fourth plan (St. 1993, c. 273, § 1) included 114 districts that did not meet the art. 101 goal of avoiding combinations of political subdivisions. However, unlike prior plans, this plan did not contain any districts that deviated from the ideal population by more than ±5%. *Id.* at 415. It was challenged by the town of Brookline for excessively dividing certain municipalities to further the goal of population equality and minority representation. In denying the challenge we stated:

> "We reject the contention that, in enacting [the plan], the Legislature erred by giving undue emphasis to population equality among districts. . . . The principle of electoral equality has long been recognized as one of the fundamental rights protected by our Constitution. In 1916, Chief Justice Rugg, speaking of art. 21 of the Amendments to our Constitution, observed: 'The great principle established by this amendment is

> equality of representation among all the [citizens] of the Commonwealth. That is a fundamental principle of representative government. . . . There can be no equality among citizens if the vote of one counts for considerably more than that of another in electing public officials.'. . . In art. 101, the people placed population equality on at least the same footing with the respect expressed for the cohesiveness of political subdivisions."

Id. at 418, quoting *Attorney Gen. v. Suffolk County Apportionment Comm'rs,* 224 Mass. 598, 604 (1916).

The 2000 Federal census results revealed that, as a result of population growth and shifts, the representative districts established in 1993 once again no longer met Federal population equality standards and had to be significantly altered. The census showed that Commonwealth's population had grown to 6,349,097 inhabitants, yielding a new ideal representative district population of 39,682 persons. This meant that, for Federal constitutional purposes, the presumptively permissible range for a district was now 39,682 $\pm$5%, i.e., between 37,698 and 41,666 persons. The ideal population under the 1993 plan had been 37,603 persons, which now fell outside of the presumptively permissible range. Due to uneven population growth in different communities, the districts established in 1993 now deviated from the new ideal population by from -15.24% to +28.33% for a maximum deviation of 43.57%.[8]

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[8] Based on the 2000 census results, nearly 200 cities and towns also redrew their ward or precinct lines. These new "building blocks"

(Continued on following page)

The Legislature established a Joint Special Committee to recommend redistricting plans for House, Senate, Executive Council, and Congressional districts. After holding public hearings, the Committee issued a report and recommended a redistricting plan on October 18, 2001. The report noted the many constraints under which the committee operated, including population equality requirements, respecting racial minority representation, and the goal of keeping communities united. 2001 House Doc. No. 4700 at 4-6. Certain cities and towns could each naturally comprise a single district, and they were kept "united whenever possible." *Id.* at 5. "The process, however, [was] not an exact science. One community with a precinct or two too many [did] not necessarily abut another community in need of a precinct or two." *Id.* All of the recommended districts in the report were within the ±5% standard, and the committee recognized that this standard allowed some latitude to keep certain communities united. *Id.* The committee recommended that Chelmsford be divided among four representative districts.[9]

On October 22, 2001, the committee's plan was debated by the full House, which adopted twenty-eight

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became the basis for the new districts to be drawn by the Legislature. They vary in size from many hundred to many thousand, are therefore not interchangeable in size and substantially complicate the task of building districts that are both compact and equal in population.

[9] Prior to the present redistricting statute, the entirety of Chelmsford was combined with the town of Carlisle to comprise a single district. See St. 1993, c. 273, § 1. According to the 2000 census on which the challenged redistricting plan is based, the population of Chelmsford is 33,858. Because the ideal population size of each district is 39,682, the entire population of Chelmsford comprises more than 15% less than an ideal district.

separate sets of amendments to the recommended districts, including eight sets of amendments proposed by Republicans. These amendments substantively changed a total of seventy-four districts – nearly one-half of the 160 districts in the plan. Chelmsford remained divided among four representative districts, although one of the districts was slightly modified by amendment. The House then adopted the amended plan by a roll call vote, with 128 representative voting in favor of the amendments and twenty-three voting against them. A substantial number of Republicans (eight of twenty-one) voted "Yea" and ten Democrats voted "Nay." The bill was passed by both the House and Senate and then signed by the Governor on November 8, 2001. St. 2001, c. 125.

The redistricting statute includes 116 districts that do not meet the art. 101 goal of avoiding combinations of political subdivisions. It divides Chelmsford among the following four districts: Second Middlesex district, with a population of 39,881; Fourteenth Middlesex district, with a population of 39,509; Sixteenth Middlesex district, with a population of 41,023; and Seventeenth Middlesex district, with a population of 41,363.[10]

4. *The plaintiffs' alternative plan.* The plaintiffs have proffered to the court an alternative plan that would divide Chelmsford between two of the four representative districts contemplated by the redistricting statute. The proposed redivision affects the population of each district,

[10] Chelmsford residents will comprise 27% of the Second Middlesex district, 20% of the Fourteenth Middlesex district, 28% of the Sixteenth Middlesex district, and only 9% of the Seventeenth Middlesex district.

and creates a different level of deviation among all four. The maximum population deviation, computed by calculating the percentage deviation from the ideal district population figure of the largest and smallest of the four districts, is 5.04% under the alternative plan, as compared to 4.68% under the redistricting statute. The average population deviation of the four districts, computed by averaging the percentage that each district deviates from the ideal district population, is 2.81% in the alternative plan, as compared to 2.14% under the redistricting statute and 2.45% for the State as a whole.

5. *Discussion.*

a. *Art. 101.* The plaintiffs first argue that the redistricting plan embodied in St. 2001, c. 125, is unconstitutional because it violates art. 101's directive that the Legislature keep intact cities, towns, and counties "as nearly as may be." Although the plaintiffs have offered an alternative plan that more closely meets the territorial integrity requirement of art. 101, they "cannot prevail in this proceeding unless they establish beyond a reasonable doubt that it is impossible by any reasonable construction to interpret the [redistricting] statute in harmony with art. 101." *Merriam v. Secretary of the Commonwealth,* 375 Mass. 246, 263 (1978). In this regard, the plaintiff bears a heavy burden of proof and "every reasonable presumption must be made in favor of the constitutionality of the statute." *Id.*

As discussed in *Mayor of Cambridge v. Secretary of the Commonwealth, ante* 476, 484 (2002), we have adopted a two-step inquiry to determine whether a redistricting plan meets the territorial requirements of art. 101. The plaintiff must first demonstrate that "the constitutional

requirement of equal representation 'can be achieved . . . without dividing a municipality and [that] an entire municipality can be kept in one district without a "ripple effect" on other defined districts.'" *Id.*, quoting *Merriam v. Secretary of the Commonwealth, supra* at 264 (Wilkins, J., dissenting). A "ripple effect" is created when fewer divisions of the town in question result in the increased division of neighboring towns and communities. *Id.*, citing *Brookline v. Secretary of the Commonwealth,* 417 Mass. 406, 422 (1994) (alternative plan created "ripple effect" where it resulted in additional division of neighboring towns). If this burden is met, the plaintiff must next establish that the Legislature's plan is without justification. *Id.* The Legislature's proffered justification is entitled to a "high degree of deference." However, the Legislature's discretion is not without limit; the Massachusetts Constitution "prohibit[s] any departure from either [the territorial integrity or population equality requirement] that is unreasonable in the light of all the limitations imposed upon legislative action." *Merriam v. Secretary of the Commonwealth, supra* at 260, quoting *Attorney Gen. v. Secretary of the Commonwealth,* 306 Mass. 25, 31-34 (1940).

We assume, without deciding, as the Secretary has, that the plaintiffs have met the first prong by proffering a satisfactory alternative plan. Under that plan, Chelmsford would be divided between only two districts; the population of the reconfigured Second, Fourteenth, Sixteenth, and Seventeenth Middlesex districts proposed by the plaintiffs would each be well within the Federal population equality ±5% standard; and there would be no identifiable adverse impact on other municipalities.

We therefore turn to the justification, that is, a closer degree of population equality. The plaintiffs' plan creates higher maximum and average deviations in population equality for the four districts in question. As described above, population equality, or the "one person one vote" construct, has been the driving force behind court and constitutional reform of the electoral districting process. Although the plaintiffs' alternative plan meets Federal equal protection requirements, *Brown v. Thomson,* 462 U.S. 835, 842 (1983) (less than 10% maximum deviation), art. 101's requirement that the Legislature achieve population equality "as nearly as may be" leaves the Legislature with considerable discretion to seek closer approximation to population equality than is required by the Federal equal protection clause. Certainly, our Constitution does not require that once the Federal equality of population requirement is met, the Legislature must maximize territorial integrity rather than seek to achieve closer population equality among the districts. As stated in *Mayor of Cambridge v. Secretary of the Commonwealth, supra* at 482, the two requirements of art. 101 are inherently contradictory.

While it is the responsibility of the Legislature to draw the redistricting plan, there is no definitive way to find the "best" such plan, because there is no single "best" way for the Legislature, let alone the courts, to determine which trade-offs between population equality, minority vote dilution,[11] and territorial cohesion are most

[11] Minority vote dilution was not a factor directly implicated in creating the districts among which Chelmsford was divided, but was very much a factor in redistricting decisions Statewide.

appropriate. The interaction of these factors is extraordinarily complex in the development of the Statewide plan, requiring an accumulation of difficult, interlocking judgments. In simplest terms, and as evident from the history of redistricting statutes enacted since the adoption of art. 101, if the Legislature wishes to more closely achieve the ideal of districts with equal populations, it must often create more districts that cross city, town, or county lines.

There is no presumptive number of districts into which a city or town of a given size may be divided to which the Legislature must adhere.[12] Nor has this court ever established a guideline above which efforts to achieve greater population equality may not intrude. It is the Legislature that has the authority and the discretion to determine "the extent to which either of these requirements shall yield to the other." *Merriam v. Secretary of the*

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[12] To the extent Chelmsford's complaint is premised on four being too many divisions for a town of 33,858, its plight is hardly unique. A cursory review of the redistricting statute reveals many others similarly situated including:

City or Town	Population	Number of Districts
Bourne	18,721	3
Easton	22,299	3
Freetown	8,472	3
Middleborough	19,941	3
Oxford	13,352	3
Randolph	30,963	3
Walpole	22,824	4
Westborough	17,997	3

Commonwealth, supra at 260, quoting *Attorney Gen. v. Secretary of the Commonwealth, supra* at 31-34.[13]

It is in this context that the plaintiffs must carry their burden of demonstrating beyond a reasonable doubt that the departures they complain of are "unreasonable." We recognize that the plaintiffs' plan and the Legislature's plan differ only in relatively small degrees. However, the Legislature reasonably could have concluded that it was preferable to seek a closer approximation of population equality in the districts in the Chelmsford area, as part of a Statewide plan that sought to balance these conflicting objectives throughout, at the expense of dividing the town among four districts. This choice is related to the permissible, well-understood, legislative objective of achieving greater equality of population.[14] That Chelmsford was consequently divided among four rather than two districts does not constitute a "substantial derogation" from the art. 101 requirement that territorial integrity be honored "as nearly as may be." If it did, any number of similar divisions made throughout the State (see note 12, *supra*) would be subject to the same criticism. Because the statute is entitled to "every reasonable presumption in favor of

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[13] Article 101 offers no guidance on whether the appropriate price to be paid for one less district that unites a city and a town is an additional one-half percent, or 1%, or 2% average or maximum deviation from population equality. It is left to the Legislature to make judgments regarding these trade-offs.

[14] It is not, as the dissent suggests, inconsistent with one of the Legislature's stated objectives to use the flexibility of the Federal ±5% standard to try and keep some communities that were within that deviation range together. It is undisputed that Chelmsford's population did not fall within that range.

[its] constitutionality," *id.* at 263, we will not disturb the Legislature's determination.

b. *Political gerrymandering.* The plaintiffs next argue that St. 2001, c. 125, constitutes a partisan political gerrymander in violation of the Federal equal protection clause. They assert that Chelmsford has been and is currently represented in the House of Representatives by a Republican, and that the Legislature's plan will destroy Chelmsford's Republican influence by dividing Chelmsford among districts that are currently represented by Democrats. We reject the plaintiffs' claim, as they have not proved that the Legislature's plan will lead to the disproportionately low representation of Republicans in the House of Representatives as a whole.

The United States Supreme Court, in *Davis v. Bandemer,* 478 U.S. 109, 127 (1986) (plurality opinion), held that to establish an equal protection violation based on partisan political gerrymandering, a plaintiff must demonstrate that the redistricting scheme has both a discriminatory intent and a discriminatory effect.[15] See *Terrazas v. Slagle,* 821 F. Supp. 1162, 1172 (W.D. Tex. 1993). As to

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[15] *Davis v. Bandemer,* 478 U.S. 109, 127 (1986), was decided by a fragmented Court. A majority held that partisan political gerrymandering complaints were justiciable. However, the Court was divided as to the requirements for such a claim. *Id.* "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'" *Marks v. United States,* 430 U.S. 188, 193 (1977), quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). We apply the plurality opinion, which provides the narrowest grounds. *Terrazas v. Slagle,* 821 F.Supp. 1162, 1172 n.12 (W.D. Tex. 1993).

discriminatory effect, the Court noted that "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm." *Davis v. Bandemer, supra* at 131. To find an equal protection violation, we must find "a history (actual or projected) of disproportionate results" and indications that a party has been denied fair representation. *Id.* at 139. "[A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively." *Id.* at 133. The claim must be supported by evidence of "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.*

The plaintiffs have not shown that the Legislature's redistricting plan has a discriminatory effect. Although they assert that Chelmsford voters have, in the past, played a part in electing a Republican to the House of Representatives, they have not demonstrated that the division of Chelmsford will result in a diminished Republican influence in either the relevant districts or the House of Representatives as a whole. Nor have the plaintiffs shown discriminatory intent on the part of the Legislature. To succeed on a political gerrymandering claim, a plaintiff must show that the Legislature has made a purposeful, concerted effort to disfavor a political party through the redistricting process. The plaintiffs have offered no evidence indicating that the Legislature's redistricting statute was the result of such efforts.

6. *Conclusion.* Judgment is to be entered for the Secretary of the Commonwealth declaring that the redistricting plan in St. 2001, c. 125, § 1, does not violate art. 101, and otherwise denying the relief requested by the plaintiffs.

So ordered.

SOSMAN, J. (dissenting, with whom Greaney and Cowin, JJ., join). According to the 2000 census on which the challenged redistricting plan is based, the population of the town of Chelmsford is 33,858. The ideal population size of each district (in order to achieve perfect population equality across all 160 districts) would be 39,682. Thus, the entire population of Chelmsford comprises less than a single district and would, ideally, be combined with a portion of one other municipality to create a district of the perfect size. I understand that such ideal redistricting is impossible, and that compromises on both population equality and territorial integrity of the districts must be made in order to obtain a redistricting plan that, as a whole, satisfies both objectives of art. 101, § 1, as amended by arts. 109, 117, and 119 of the Amendments to the Massachusetts Constitution.

The Legislature has split Chelmsford into four separate districts (where it was previously contained within a single district, St. 1993, c. 273, § 1), placing 10,943 Chelmsford residents in the Second Middlesex district (total district population of 39,881), 7,759 Chelmsford residents in the Fourteenth Middlesex district (total district population of 39,509), 11,407 Chelmsford residents in the Sixteenth Middlesex district (total district population of 41,023), and 3,749 Chelmsford residents in the Seventeenth Middlesex district (total district population of

41,363). Chelmsford residents thus will comprise less than one third of the population of each of those districts.[1] Chelmsford's territorial integrity has not been honored, nor has the pragmatic purpose underlying territorial integrity been met by creating any district in which Chelmsford residents predominate or even approach a majority.

The plaintiffs have submitted a proposed plan dividing Chelmsford into only two districts. The reconfiguration of the Second, Fourteenth, Sixteenth, and Seventeenth Middlesex districts proposed by the plaintiffs is virtually identical to the Legislature's plan in terms of population equality and has no adverse impact on other districts. The plaintiffs have, by their proposed plan, met their initial burden of showing that a plan that protects Chelmsford's territorial integrity can readily be formulated, and that such a plan can simultaneously satisfy the equally important art. 101 command of population equality, without causing undesirable "ripple effects" across other districts.[2] See *Brookline v. Secretary of the Commonwealth,* 417 Mass. 406, 420-422 (1994). Where that burden has been met, the Legislature's plan violates art. 101 if its division of Chelmsford into more districts "is without justification." *Ante* at ___, citing *Brookline v. Secretary of the Commonwealth, supra* at 421.

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[1] Chelmsford residents will comprise 27% of the Second Middlesex district, 20% of the Fourteenth Middlesex district, 28% of the Sixteenth Middlesex district, and only 9% of the Seventeenth Middlesex district.

[2] Beyond significantly improving Chelmsford's territorial integrity, the plaintiffs' plan places only wards of the city of Lowell in the Seventeenth Middlesex. Thus, the plaintiffs' plan enhances the territorial integrity of Lowell as well.

The court today accepts as "justification" for this fragmenting of Chelmsford the claim that the Legislature's plan achieves "a closer degree of population equality," *ante* at ___, noting that "the Legislature . . . has the authority and the discretion to determine 'the extent to which either of these requirements shall yield to the other.'" *Ante* at ___ quoting *Merriam v. Secretary of the Commonwealth,* 375 Mass. 246, 260 (1978).[3] However, the claimed improvements in measurements of population equality are not only minuscule, but have been misapplied to the facts of this case in a fashion contrary to their use in other redistricting cases. Infinitesimal improvements in improperly calculated measures of population equality do not qualify as a legitimate excuse for doubling the number of divisions of a town that is itself smaller than a single district. Indeed, the population equality gains claimed are so

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[3] The court's attempt to minimize the importance of territorial integrity by reference to the evolution of art. 101 and to the history of ever increasing divisions of municipalities over the course of sequential redistricting plans is contrary to the express wording of the constitutional mandate at issue. "[S]uch district[s] shall be formed, *as nearly as may be,* without uniting two counties or parts of two or more counties, two towns or parts of two or more towns, two cities or parts of two or more cities, or a city and a town, or parts of cities and towns, into one district" (emphasis added). Art. 101, § 1. The requirement of population equality is set forth in identical terms. The districts are to be formed "so that each representative will represent an equal number of inhabitants, *as nearly as may be*" (emphasis added). *Id.* Given that it is impossible to achieve both goals perfectly and simultaneously, the Legislature has the discretion to make compromises between the two as it configures the specific boundaries of the 160 districts. It does not have discretion to downgrade the importance of either of these constitutional mandates, which are of equal force and are required to meet the identical standard of "as nearly as may be." The suggestion that the Legislature may simply treat territorial integrity as less important than population equality is contrary to the Constitution.

trifling as to be mere coincidence, not the product of a legislative decision to give greater preference to such measurements of population equality at the expense of territorial integrity. Rather, this post hoc justification for fragmenting Chelmsford is contrary to the Legislature's stated preferences as to how the balance between population equality and territorial integrity was to be struck. While I recognize that considerable deference must be accorded to legislative judgment in the complex redistricting process, the justification now proffered is devoid of any statistical significance and contrary to the Legislature's expressed views on the subject.

The two sets of population figures compare as follows. For the Second Middlesex as configured in the redistricting statute, the district population is 39,881 (199 higher than the ideally sized district of 39,682), whereas the plaintiffs' alternative plan for that same district gives it a population of 38,978 (704 lower than the ideal). For the Fourteenth Middlesex as designed by the statute, the population is 39,509 (173 lower than the ideally sized district), whereas the plaintiffs' plan gives that district a population of 40,890 (1,208 higher than the ideal). For the Sixteenth Middlesex, the statute allocates a population of 41,023 (1,341 higher than the ideally sized district), whereas the plaintiffs' plan gives that district a population of 40,981 (1,299 higher than the ideal). Finally, for the Seventeenth Middlesex, the redistricting statute assigns a population of 41,363 (1,681 higher than the ideally sized district), whereas the plaintiffs' plan gives the district a population of 40,927 (1,245 higher than the ideal). Thus, the plaintiffs' plan is closer to ideal size for two districts (Sixteenth and Seventeenth Middlesex), while the Legislature's redistricting statute is closer to the ideal for the

other two districts (Second and Fourteenth Middlesex). Moreover, the deviations in the plaintiffs' plan are all smaller than the largest deviations for these four districts in the redistricting statute.[4]

The defendant argues, however, and the court today accepts as "justification," that two statistical computations, applied to just these four districts in isolation, make the Legislature's plan superior in terms of population equality. First, the defendant presents the calculation of the "average deviation" from the ideal across the four districts. Specifically, if we average the percentage by which the four districts as configured by the redistricting statute deviate from the ideally sized district, that "average deviation" is smaller than the "average deviation" calculated on the four districts in the plaintiffs' plan. Under the redistricting statute, the "average deviation" for the four districts is 2.14% (i.e., they are on average 2.14% off of the ideal district), whereas the "average deviation" for the same four districts under the plaintiffs' plan is 2.81%. The difference between these two averages is thus .67, or two-thirds of one percentage point.

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[4] Specifically, the largest deviation in the plaintiffs' plan is in the Sixteenth Middlesex, with a population of 40,981, or 1,299 higher than ideal. The redistricting statute has greater deviation from the ideal size in both the Sixteenth Middlesex (population 41,023, or 1,341 higher than ideal) and the Seventeenth Middlesex (population 41,363, or 1,681 higher than ideal). In percentage terms, the plaintiffs' plan for these four districts deviates from the ideal by a maximum of 3.27%, whereas the statute's provisions for these four districts has one district that is 4.24% higher than ideal and another district that is 3.38% higher than ideal.

The other statistical measurement put forth to demonstrate the allegedly superior population equality of the redistricting statute is referred to as "maximum" or "total deviation," which measures the difference between the largest and the smallest districts. Applying that measurement to just these four districts, the difference between the largest and smallest districts in the redistricting statute is 4.68%.[5] Calculating that same measurement on the largest and smallest of these four districts in the plaintiffs' plan, the difference is 5.04%.[6] The difference between the two plans on this measurement applied to these four districts is a difference of .36, approximately one-third of one percentage point.

Thus, the alleged superiority of the redistricting statute in terms of population equality, that ostensibly justifies splitting Chelmsford (and Lowell) further than otherwise necessary, is measured in fractions of a single percentage point. While the Legislature is to be accorded great deference in weighing these competing interests, such de minimis improvements in population equality should not qualify as adequate justification for substantial derogation from the equally important constitutional requirement that territorial integrity be honored "as nearly as may be." Art. 101, § 1.

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[5] That is, the largest district of these four, under the redistricting statute, is the Seventeenth Middlesex, at 4.24% higher than ideal, while the smallest district is the Fourteenth Middlesex, at .44% below ideal. The range between those two is thus 4.68%.

[6] The largest district of these four, under the plaintiffs' plan, is the Sixteenth Middlesex, at 3.27% higher than ideal, while the smallest district is the Second Middlesex, at 1.77% below ideal. The range between those two is thus 5.04%.

Moreover, when we look at the proffered statistical measures applied to the two redistricting schemes *as a whole,* one of the claimed differences disappears entirely, and the other shrinks to near zero. The measurements of "average deviation" and "maximum deviation" are utilized in review of redistricting plans by applying them to the entirety of the plan being considered. All of the cases cited by the defendant in support of the use of these statistical measures apply them to the entirety of a districting scheme. See *Abrams v. Johnson,* 521 U.S. 74, 98-99 (1997) (applied to entirety of Georgia's congressional districts); *Brown v. Thomson,* 462 U.S. 835, 838 (1983) (applied to entirety of Wyoming's State representative districts); *Karcher v. Daggett,* 462 U.S. 725, 728 (1983) (entirety of New Jersey's congressional districts); *White v. Weiser,* 412 U.S. 783, 785 (1973) (entirety of Texas's congressional districts); *White v. Regester,* 412 U.S. 755, 761, 764 (1973) (Texas State representative districts); *Gaffney v. Cummings,* 412 U.S. 735, 737 (1973) (Connecticut State legislative districts). Not surprisingly, the defendant cites no authority for the proposition that these specific statistical measures are of any utility when applied to only a few districts within a much larger plan. A plan's adherence to population equality requirements cannot be assessed by reference to anything less than the plan as a whole. After all, what is being assessed is the plan itself, not just some subset of districts within that plan. Thus, we should consider what difference in these statistical measurements for the entire plan would result if the plaintiffs' alternative plan were to be adopted.

The measurement of "maximum deviation," i.e., the difference between the largest and smallest districts in the entire plan, is the same under the redistricting statute as

it is under the plaintiffs' proposed alternative plan. Under either approach, the largest and smallest districts in the Commonwealth remain the same.[7] Thus, viewing the plan as a whole, the maximum deviation measure of population equality is not any different under the redistricting statute than it is under the plaintiffs' plan, and that measurement, properly applied, provides no "justification" whatsoever for doubling the divisions of Chelmsford.

Applying the measurement of "average deviation" to each plan as a whole yields an infinitesimal difference between the two. Specifically, the average deviation under the redistricting statute is 2.45%. In other words, considering all 160 districts, the average percentage by which they deviate from the ideal district size is 2.45%. Making the changes proposed in the plaintiffs' alternative plan, the average deviation across the resulting 160 districts would be 2.47%, again meaning that, under that plan, the average percentage by which the districts over all would deviate from the ideal district size would be 2.47%. The difference between those two figures is a mere .02%, that is, two one-hundredths of one per cent. As illustration of the utterly de minimis quality of that figure, that magnitude of percentage difference, applied to the ideal district population of 39,682, amounts to an average difference of eight people per district. Given that the sizes of the various districts as configured by the statute differ by several

[7] The largest district would still be the Twelfth Hampden district, at a population of 41,642, or 4.94% above the ideal district. The smallest district would still be the Twelfth Middlesex, at a population of 37,801, or 4.74% below the ideal district. The total deviation between those two extremes is thus 9.68% under either the redistricting statute or the plaintiffs' plan.

thousand people, differences of only eight people per district are meaningless. The notion that Chelmsford's fragmentation into four districts is justified by a desire to improve the distance from ideal population size by a mere eight people per district is patently absurd.

The insignificance of this claimed superiority of the population equality provided by the Legislature's redistricting statute may also be illustrated by comparing the magnitude of deviations tolerated by the Legislature in its redistricting statute to the magnitude of the deviations proposed in the plaintiffs' plan. In the redistricting statute, the Legislature frequently accepted deviations from ideal population size far greater than the 1.77% to 3.37% deviations now proposed in the plaintiffs' plan. The greatest deviation from ideal size in the plaintiffs' plan is in their proposed Sixteenth Middlesex, with a population of 40,981 (or 1,299 higher than ideal). In the redistricting statute, there are *twenty-four* districts that are even larger than that (and thus even farther above the perfect district population of 39,682).[8] Similarly, the statute has another *twenty-six* districts with a population that deviates by

[8] Two of the districts that are larger than the plaintiffs' largest proposed district are the statute's Sixteenth and Seventeenth Middlesex districts, which also include portions of Chelmsford. Indeed, there are five Middlesex districts in the statute that are larger than the plaintiffs' largest proposed district. The Legislature's willingness to tolerate population deviations larger than those proposed by the plaintiffs is not explained by reference to some particular need in some distant part of the Commonwealth. These are deviations the Legislature viewed as acceptable in various parts of Middlesex County, including within Chelmsford itself.

more than 1,299 *below* the ideal.[9] Thus, there are fifty districts in the redistricting plan approved by the Legislature (or almost one-third of the 160 districts) that are "worse" in terms of population equality than the "worst" of the deviations proposed in the plaintiffs' plan. The plaintiffs' plan is clearly well within what the Legislature viewed as an acceptable magnitude of deviation from population equality perfection, and there is no suggestion that the Legislature decided that territorial integrity had to yield in order to prevent deviations of the size presented by the plaintiffs' plan.[10]

To the contrary, the Legislature expressly identified that its preference was to compromise population equality up to the maximum deviations permitted in order to preserve territorial integrity. As evidenced by the Joint Special Committee's Report, the Legislature adopted the 5% standard (tolerating deviations from ideal size of up to 5% in either direction) as the appropriate population equality goal, and recognized that the "latitude" of the 5%

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[9] Four of those twenty-five districts are within Middlesex County. See note 8, *supra*.

[10] The deviations in the plaintiffs' plan are also well within the deviations permitted under the Fourteenth Amendment. See *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993), quoting *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983). Both the statute and the plaintiffs' plan are below the 5% mark set by Federal precedent (no more than 5% above or 5% below the ideal population size, for a maximum total deviation of 10%) and, as discussed above, it is the plaintiffs' plan, not the redistricting statute, that keeps these four districts even further below that maximum permissible figure by almost a full percentage point (see note 4, *supra*). This is not a case where the population deviations from the ideal needed to maintain Chelmsford's territorial integrity would be at (or even anywhere near) the 5% maximum allowed. Rather, they are all comfortably within the acceptable range.

measure had the desirable effect of allowing it "to keep together communities, which might be a bit smaller, as well as communities, which are a bit larger." Joint Special Committee on the Redistricting and Reapportionment, Report Relative to a New Division of the Commonwealth into One Hundred and Sixty State Representative Districts, 2001 House Doc. No. 4700, at 5. There is no suggestion that the Legislature intended to split up communities in order to achieve imperceptible gains in "average population deviation." The Joint Committee's Report does not even mention the "average" deviation, let alone announce any goal of minimizing that "average." Rather, the Legislature announced its intention to exploit the "latitude" of the 5% standard to "keep together communities."[11] That 5%

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[11] The court today attempts to avoid the clear import of the Joint Committee Report by suggesting that somehow this comment was limited to those municipalities that could, by themselves, comprise a single district. *Ante* at ___. Nothing suggests that the Joint Committee was espousing such a cramped view of the utility of the 5% standard. Indeed, in the entire plan, there are only seven districts that are entirely comprised of the entirety of a single community, and six of those have a population that is within a few hundred of the ideal population of 39,682. Only one such single community comprising a single district required the "latitude" of the 5% standard to remain as a single district, that being the Fourth Worcester district, which is comprised of the entirety of Leominster, with a population of 41,303. The Report's reference to the "latitude" of the 5% standard allowing it to "keep together communities," identifying it as "an important facet of the map-making process," does not refer to the configuration of only the Fourth Worcester district. Joint Special Committee on the Redistricting and Reapportionment, Report Relative to a New Division of the Commonwealth into One Hundred and Sixty Representative Districts, 2001 House Doc. No. 4700, at 5. Rather, the announced goal of "keep[ing] together communities" is a clear reference to the concept of territorial integrity, and the reference to the "latitude" of the population equality standard that allowed the Committee to "keep together communities" signals a clear intent to utilize that "latitude" in the

(Continued on following page)

standard accepts deviations from the ideal of up to 1,984 people per district, indicating that the Legislature had no desire to obsess over average differences on the order of eight people per district. In accordance with that standard, the Legislature accepted population deviations far larger than those in the plaintiffs' plan and affirmatively utilized them so as to preserve and enhance territorial integrity. That is precisely what the plaintiffs' plan does. As such, it is consistent with, not contrary to, the Legislature's view of how the competing goals of population equality and territorial integrity are to be balanced.

There is no justification for the Legislature's fragmenting of Chelmsford.[12] We must show great deference to

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interest of preserving territorial integrity. *Id.* The Joint Committee Report does not suggest that the 5% standard was only useful only to the extent that it allowed a perfect single municipality-single district match.

[12] I agree with the court's opinion, *ante* at ___, that the plaintiffs have failed to establish their claim that the Legislature's plan constitutes a partisan political gerrymander in violation of equal protection guarantees, as they have failed to show that the plan "substantially disadvantages certain voters in their opportunity to influence the political process effectively" or that there has been "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Davis v. Bandemer,* 478 U.S. 109, 133 (1986) (opinion of White, J.). It is apparent, however, that splitting up Chelmsford in the way that the Legislature has done places portions of Chelmsford – which has historically voted for a Republican representative – into each of four districts that have historically voted for Democrats as representatives, with Chelmsford now comprising only a minority percentage of each of those four districts. The present Republican incumbent from Chelmsford will be placed within a district that is dominated by an incumbent Democrat from Lowell, and that Lowell incumbent was successful in obtaining a further amendment to the Legislature's plan that served to increase his domination in the newly formed district. The apparent

(Continued on following page)

legislative judgment in the intensely political and highly complex matter of redistricting, but, in my view, the court today has improperly descended from deference to abdication. The eight person per district "gain" in average population deviation engendered by the Legislature's plan is so de minimis as to be nonexistent, and reflects only mathematical coincidence, not legislative design. Meanwhile, the Legislature's division of Chelmsford into four separate districts, with no district in which Chelmsford even comes close to a majority, deprives Chelmsford of any semblance of territorial integrity.[13] The Legislature has

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reason behind the Legislature's plan – the favoring of one incumbent over another based on party affiliation – is not a legally acceptable justification for splitting Chelmsford into four districts, and the defendant did not proffer such a justification.

[13] The court today suggests that Chelmsford's loss of territorial integrity is somehow not a matter of concern because it is not the only small town that could have fit within a single district but was instead split among several different districts. *Ante* n.12. Of course, none of the towns listed has made any challenge to the redistricting statute, and we therefore know nothing of the merits of any challenges that could theoretically have been brought. In particular, we have no way of knowing whether, as has been shown here, those towns' territorial integrity could have been better protected while simultaneously maintaining population equality and without causing any adverse ripple effects within neighboring districts and municipalities. In the absence of any challenges and any alternative plan, we must assume that the multiple divisions of those other towns was in fact necessary to satisfy some other legitimate goal. However, the plaintiffs here have met their burden of formulating an alternative plan that satisfies the tests laid out in *Brookline v. Secretary of the Commonwealth,* 417 Mass. 406, 420-421 (1994), quoting *Merriam v. Secretary of the Commonwealth,* 375 Mass. 246, 264 (1978) (Wilkins, J., dissenting). Having met their burden of proving that the division of Chelmsford into so many pieces is unjustified and therefore unconstitutional, it is no solace to Chelmsford that other towns have also been divided into many pieces.

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broad discretion to balance the competing interests of population equality and territorial integrity. It does not have the discretion to abandon one of the mandates in art. 101 merely to achieve a couple hundredths of a per cent gain on one measure of the other competing mandate, nor did the Legislature indicate any intent to give any weight – let alone such inordinate weight – to that "average deviation" measure of population equality. Rather, the Legislature strived for, and the plaintiffs' plan maintains, a total maximum population deviation of 9.68%, within the Federal standard, and claimed that it was using the "latitude" of that standard to *preserve* territorial integrity. It may not now point to its coincidental two one-hundredths of a percentage point improvement on a measurement it never even mentioned as the justification for depriving the town of Chelmsford of anything resembling territorial integrity. The plaintiffs have shown, beyond a reasonable doubt, that there is no lawful justification for splitting Chelmsford into four districts and that the Legislature's plan therefore violates art. 101. I therefore respectfully dissent.

That fact should certainly not deprive Chelmsford of the relief to which it is entitled.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

AT BOSTON, April 29, 2002

IN THE CASE NO. SJC-08715

RICHARD P. MCCLURE & OTHERS

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vs.

SECRETARY OF THE COMMONWEALTH

---

pending in the Supreme Judicial

Court for the Commonwealth No. OE-112

ORDERED, that the following entry be made in the docket; viz., –

Judgment is to be entered for the Secretary of the Commonwealth declaring that the redistricting plan in St. 2001, c. 125, § 1, does not violate art. 101 of the Amendments to the Constitution of the Commonwealth, and otherwise denying the relief requested by the plaintiffs.

BY THE COURT,

/s/ Susan Mellen, CLERK.

April 29, 2002

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. **SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY NO. SJC-08715**

RICHARD P. McCLURE,
JOHN P. CLANCY,
JOHN S. FUDGE, Jr. and
PETER DULCHINOS,
PLAINTIFFS

V.

WILLIAM F. GALVIN; in his capacity as Secretary of the Commonwealth of Massachusetts,
DEFENDANT

COMPLAINT AND PETITION FOR A WRIT OF MANDAMUS PURSUANT TO CHAPTER 125, SECTION 2 OF THE ACTS OF 2001

INTRODUCTION

This is an action for declaratory relief, writ of mandamus, and for interlocutory or permanent injunctions restraining the enforcement, operation, or execution of the recently enacted redistricting plan, Chapter 125 of the Acts of 2001, by restraining the actions of the defendant, William F. Galvin, Secretary of the Commonwealth of Massachusetts; and any other state officers in the enforcement or execution of such constitutional or statutory provisions of said plan enacted by the Legislature and signed into law by Jane Swift; acting Governor of the Commonwealth of Massachusetts on November 8, 2001.

Plaintiffs are citizens, taxpayers and qualified electors of the United States, Commonwealth of Massachusetts,

Town of Chelmsford and the County of Middlesex and are also members of the Republican party. Plaintiffs, pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure, bring this action on their own behalf and on behalf of all other persons, citizens, taxpayers, Republican party members, qualified voters in the Town of Chelmsford, Middlesex County and Commonwealth of Massachusetts who are similarly situated.

Plaintiffs contend, inter alia, that said redistricting plan denies them the right to due process and the equal protection of the laws guaranteed under the Fourteenth Amendment to the United States Constitution and the Massachusetts Constitution and dilutes the strength of their vote via unconstitutional gerrymandering and excessive fragmentation of political subdivisions contrary to Amendment Article 101 of the Massachusetts Constitution.

The common relief sought against the defendant in his official capacities relates to the carrying out of the election laws with respect to the election of representatives of the state legislature, the calling of elections therefor, the elections, the preparation of the ballots therefor, and the taking of all steps necessary for the holding of elections, both nominating and general; to all matters relating to the election of such representatives to the state legislature.

PARTIES

1. Plaintiff, Richard P. McClure, is an individual residing at 8 Westford Street, Chelmsford, Middlesex County, Massachusetts.

2. Plaintiff, John P. Clancy, is an individual residing at 53 Ansie Road, Chelmsford, Middlesex County, Massachusetts.

3. Plaintiff, John S. Fudge, Jr. is an individual residing at 255 North Road, Chelmsford, Middlesex County, Massachusetts.

4. Plaintiff, Peter Dulchinos, is an individual residing at 17 Spaulding Road, Chelmsford, Middlesex County, Massachusetts.

6. Defendant, William F. Galvin, is the Secretary of the Commonwealth of Massachusetts with offices at State House, Boston, Suffolk County, Massachusetts.

JURISDICTION

7. The Supreme Judicial Court of the Commonwealth of Massachusetts has jurisdiction over the plaintiffs' claims pursuant to Section 3 of Amendment Article 101 of the Massachusetts Constitution and Section 2 of Chapter 125 of the Acts of 2001.

BACKGROUND

8. On or about October 25, 2001, the House of Representatives passed House bill No. 4701, as amended, (originally House bill No. 4700) entitled *An Act Relative To Establishing Representative Districts In The General Court*

9. On or about November 8, 2001, the House and Senate passed Chapter 125 of the Acts of 2001 (hereinafter referred to as the "Act") which adopts the aforesaid House bill 4701 for the purposes of establishing 160 representative districts throughout Massachusetts.

10. On or about November 8, 2001, acting Governor Jane Swift, signed the Act and said Act became law effective immediately pursuant to its emergency preamble.

11. Section 2 of said Act states:

> "The supreme judicial court shall have jurisdiction of any petition for a writ of mandamus relative to the establishment of 160 representative districts under section 1. Every such petition shall be filed in the court within 10 days after the effective date of this act."

FACTS

12. Upon reasonable information and belief, the 2000 federal census figures indicate a total population for the Commonwealth of Massachusetts to equal 6,349,097.

13. Upon reasonable information and belief, the state representative target population equals 39,682.

14. Upon reasonable information and belief, the Act divides the Commonwealth into 160 representative districts of approximately equal size, with a population variance of approximately 10% between the most and least populous districts.

15. Upon reasonable information and belief, the 2000 federal census indicates the town of Chelmsford, County of Middlesex, in the Commonwealth of Massachusetts, has a population of 33,858.

16. The town of Chelmsford was totally intact as a representative district (9 precincts) and in combination with the town of Carlisle as the 16th Middlesex district prior to the enactment of the Act.

17. The Act divides the town of Chelmsford's 9 precincts into 4 separate representative districts as follows:

Second Middlesex. – Consisting of precincts 3, 7 and 5, of the town of Chelmsford, and the towns of Littleton and Westford, both in the county of Middlesex

Fourteenth Middlesex – Consisting of precincts 1, 2 and 6, of the town of Acton, the towns of Carlisle and Concord, and precincts 1 and 9, of the town of Chelmsford, all in the county of Middlesex.

Sixteenth Middlesex. – Consisting of precincts 2, 6 and 8, of the town of Chelmsford, precincts 1, 2 and 3 of ward 5, and all precincts of wards 6 and 9, of the City of Lowell, both in the county of Middlesex.

Seventeenth Middlesex. – Consisting of precinct 4, of the town of Chelmsford, and all precincts of ward 1, precinct 3 of ward 2, precincts 2 and 3 of ward 4, and all precincts of wards 10 and 11, of the City of Lowell, in the county of Middlesex.

COUNT I

18. Amendment Article CI of the Articles of Amendment to the Massachusetts Constitution (Amendment Article 101) mandates that county and town boundaries be respected in the redistricting process by providing, in Section 1, that:

> "such district shall be formed, as nearly as may be, without uniting two counties or parts of two or more counties, two towns or parts of two or more towns, two cities or parts of two or more cities, or a city and a town, or parts of cities and towns, into one district."

19. The Second Middlesex district, as created by the Act, unites the towns of Chelmsford, Littleton and Westford.

20. The Fourteenth Middlesex district, as created by the Act, unites the towns of Chelmsford, Acton, Carlisle and Concord.

21. The Sixteenth Middlesex district, as created by the Act, unites the town of Chelmsford with portions of the City of Lowell.

22. The Seventh Middlesex District, as created by the Act, unites the town of Chelmsford with portions of the City of Lowell.

23. The Legislature, in enacting the Act, unduly and unlawfully departed from the directive in art. 101 to respect the political subdivisions during the redistricting process.

24. The Act is so blatantly unreasonable in the creation of four representative districts, via the quartering of the town of Chelmsford, as to be vicious in nature and violates the Commonwealth's long history, tradition and constitutional mandate of respecting such political subdivisions in the redistricting process.

25. The Act, as it applies to the dissection of the town of Chelmsford, is unjustifiable, unreasonable, excessive and irrational so as to be vicious in nature and makes no reasonable effort to conform to the requirements of the Constitution.

26. The Legislature, in dividing the town of Chelmsford into four separate districts, failed to meet both the constitutional goals of equal representation and the preservation of political subdivisions when such alternatives were

readily available with no "ripple effect" on other defined districts.

27. As a direct and proximate consequence of the unconstitutionality of the Act, the plaintiffs, and those similarly situated, are deprived of their right to a strong vote, and, in fact, their vote is diluted, in any proposed legislation affecting the interests of the inhabitants of the town of Chelmsford.

COUNT II

28. Plaintiffs reassert the allegations in paragraphs 1-24 as if specifically set forth herein

29. The town of Chelmsford has historically been, and is currently, represented in the House of Representatives by a member of the Republican party.

30. The House of Representatives is currently controlled by an overwhelming majority of members of the Democratic party.

31. The Second Middlesex district, as proposed by the Act, combines precincts 3, 7 and 5, of the town of Chelmsford (total population of 10,943) to the town of Westford (20,754) and the town of Littleton (8,445). Westford's current representative is a member of the Democratic party.

32. The Fourteenth Middlesex district, as proposed by the Act, combines precincts 1 and 9, of the town of Chelmsford (7,759) with the towns of Concord (15,559) and Carlisle (4,717) and precincts 1, 2 and 6 of Acton (10,040). Concord's and Acton's current representative is a member of the Democratic party.

33. The Sixteenth Middlesex district, as proposed by the Act, consists of precincts 2, 6 and 8 of the town of Chelmsford (11,407) and precincts 1, 2 and 3 of ward 5, and all precincts of wards 6 and 9, of the City of Lowell (29,163).

34. The Seventeenth Middlesex district, as proposed by the Act, consists of precinct 4 of the town of Chelmsford (3,749) and all precincts of ward 1, precinct 3 of ward 2, precincts 2 and 3 of ward 4, and all precincts of wards 7 and 8 of the City of Lowell (37,614). All of the 3 current representatives from the City of Lowell are members of the Democratic party.

35. Chapter 125 of the Acts of 2000, "the Act", intentionally discriminates against the plaintiffs, and those similarly situated members of the Republican party, in that the dissection of the town of Chelmsford, a historically Republican representative seat, and the subsequent apportionment of relatively small precincts to more populated and historically democratic districts, constitutes unconstitutional partisan gerrymandering, will consistently degrade the plaintiffs' influence on the political process as a whole and is violative of the Equal Protection clause of the Fourteenth Amendment.

COUNT III

36. Plaintiffs reasserts [sic] the allegations in paragraphs 1-32 as if specifically set forth herein.

37. The Act, originating as House bill no. 4700, states in Chapter 1, paragraph 4, that all districts are within 5% (+/-) of the population of the Commonwealth divided by 160.

38. In art. 101, the people placed population equality on at least the same footing with the respect expressed for the cohesiveness of political subdivisions.

39. The only State justification that the Supreme Court of the United States has found sufficient to justify a total maximum deviation greater than 10 percent was a consistently applied *respect for the integrity of political subdivision boundaries* (emphasis added) which resulted in a total maximum deviation of 16.4 percent.

40. The Legislature's strict adherence to a total maximum deviation of 10 percent is contrary to and violative of art. 101 in that it promotes excessive fragmentation of political subdivisions.

41. As a direct and proximate consequence of said excessive fragmentation of political subdivisions, the plaintiffs, and those similarly situated, are deprived of their right to a strong vote, and, in fact, their vote is diluted in any proposed legislation affecting the interests of the inhabitants of the town of Chelmsford.

COUNT IV (mandamus action)

42. Plaintiffs reassert the allegations in paragraphs 1-41 as if specifically set forth herein.

43. C. 125 of the Acts of 2001 is unconstitutional on its face in that it is violative of art. 101 of the Massachusetts Constitution and denies plaintiffs, and those similarly situated, equal protection of the laws guaranteed by the Fourteenth Amendment to the Unites [sic] States Constitution.

44. The defendant, Secretary of the Commonwealth, has a duty, without discretion, to carry out the election laws of the Commonwealth with respect to the election of state representatives in accordance with c. 125.

45. Enforcement of said c. 125 by the defendant, Secretary of the Commonwealth violates plaintiffs' constitutional rights guaranteed by art. 101 and the Fourteenth Amendment to the United States Constitution.

46. Plaintiffs have no other remedy other than the injunctive relief sought by this action.

47. Plaintiffs attach *Plaintiffs' Proposed Redistricting Plan* in support of all claims.

WHEREFORE, plaintiffs pray:

1. That the full supreme judicial court be called to hear and determine this cause.

2. That the court declare:

   a. That the apportionment law, Chapter 125 of the Acts of 2001, deprives and continues to deprive plaintiff, and other individuals similarly situated, of due process of law and of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and Article 101 of the Massachusetts Constitution.

   b. There has been a purposeful and systematic plan embodied in said apportionment law, House Bill 4701, whereby active and progressive steps have been taken which discriminate against certain geographic areas and classes of persons, depriving plaintiff, and all those similarly situated, of due process of law and the equal protection of the laws in violation of the Fourteenth Amendment of the

United States Constitution and the Massachusetts Constitution.

c. That the Legislature has unduly departed from the directive in art. 101 to respect the political subdivisions during the redistricting process.

d. That the plaintiff has demonstrated a reasonable likelihood of success on the merits and that the balance of equities favor keeping the existing representative districts intact for the 2002 elections pending final judgment of this matter.

3. That the court:

a. Order a speedy completion of the pleadings and discovery;

b. Declare and Order that the defendants be enjoined from preparing ballots based on representative districts set forth in the Act;

c. Restrain the defendants from calling a general election after 2001 for the election of representatives and senators until such time as the legislature can draw new and constitutionally appropriate legislative districts or, in the alternative, declare and Order that the 2002 elections be based on the 2000 representative districts.

4. That following a Hearing on the merits, appropriate injunctive relief be entered,

5. That the plaintiffs be awarded attorney's fees and costs in bringing said action, and

6. That the court grant other such and further relief as it may deem just and proper.

Dated: January 18, 2002

Richard P. McClure,
John P. Clancy,
John S. Fudge, Jr., and
Peter Dulchinos,
Plaintiffs,

by their attorney,

/s/ Richard P. McClure
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APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. **SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY NO. SJC-08715**

RICHARD P. McCLURE, et al

PLAINTIFFS

V.

SECRETARY OF THE COMMONWEALTH,

DEFENDANT

PLAINTIFFS' PROPOSED REDISTRICTING PLAN

Now come the plaintiffs in the above captioned matter and offer the following proposed redistricting plan:

Seventeenth Middlesex – consisting of wards 1, 10 and 11, precincts 2 and 3 of ward 4, precinct 3 of ward 2, and precinct 2 of ward 5, of the city of Lowell, all in the County of Middlesex, with a **total population of 40,927**.

*substitutes precinct 2 of ward 5, Lowell for precinct 4 of Chelmsford; thereby removes the only Chelmsford precinct from an otherwise all Lowell district and returns it to other Chelmsford precincts allowing the Seventeenth Middlesex to to stand as an entirely Lowell based district with no "ripple effect."

Sixteenth Middlesex – consisting of precincts 2, 3, 7, and 8 of the town of Chelmsford and wards 6 and 9, and precincts 1 and 3 of ward 5, of the city of Lowell, all in the County of Middlesex, with a **total population of 40,981**.

*removes precinct 6 of the town of Chelmsford and precinct 2 of ward 5 of the city of Lowell and replaces them with precincts 3 and 7 of the town of Chelmsford; allows precinct 6 to reunite with with four other Chelmsford precincts and returns precinct 2 of ward 5 to an all Lowell district with no "ripple effect."

Fourteenth Middlesex – consisting of the towns of Concord and Carlisle, and precincts 1, 4, 5, 6, and 9 of the town of Chelmsford, all in the County of Middlesex, with a **total population of 40,890**.

*removes precincts 1, 2, and 6 of the town of Acton and substitutes them with precincts 4, 5, and 6 of the town of Chelmsford; allowing five Chelmsford precincts to stand together with no "ripple effect."

Second Middlesex – consisting of the towns of Littleton and Westford, and precincts 1, 2, and 6 of the town of Act on, all in the County of Middlesex, with a **total population of 38,978**.

*removes precincts 3, 7, and 5 of the town of Chelmsford and replaces them with precincts 1, 2, and 6 of the town of Acton; allowing Chelmsford to only be cut into two districts and not four districts as originally proposed with "no ripple effect."

In support of said plan, plaintiffs state the following:

1. no newly proposed districts deviate from the ideal district population (39,682) by more than plus or minus five percent.

2. all newly proposed districts consist of contiguous territory.

3. a sufficient showing has been made on the claim of excessive division by the plaintiffs so as to invalidate the provisions of c. 125 that affect them.

4. the effect of c. 125 on the town of Chelmsford (as well as the city of Lowell) is "unnecessary and incompatible with reasonable effort to conform to the requirements of the Constitution." *Town of Brookline et al v. Secretary of the Commonwealth*, 1994, quoting *Brophy v. Suffolk County Apportionment Comm'rs*, 225 Mass. 124, 126 (1916) and is so "unreasonable as to be "vicious in its nature." *Merriam v. Secretary of the Commonwealth*, 375 Mass. 246 (1978).

5. plaintiffs' proposed plan honors the territorial integrity of Chelmsford and Lowell to a greater extent than does c. 125.

6. plaintiffs' proposed plan has no negative or "ripple effect" on the territorial integrity of surrounding municipalities and is in compliance with both art. 101 and *Brookline v. Secretary of the Commonwealth*, id.

Dated: January 18, 2002

Plaintiffs,
by their attorney,

/s/ Richard P. McClure
Richard P. McClure, Esquire
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APPENDIX E

BEST AVAILABLE COPY